EDITOR'S NOTE

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86-811

NO._____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

EDGAR MOSLEY, PETITIONER

V.

R. NOEL ET AL., RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDGAR MOSLEY
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91109
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QUESTIONS PRESENTED

(1) Whether the district court and appeals court abused their authority in denying petitioner's claim prior to applying the rules that governs the granting of summary judgment F.Rule Civ.Proc. 56(c) and 28 U.S.C. 636 (b)(1)(A) and 28 U.S.C. 636 (C).

(2) Whether named respondents acting under color of state violated peitioner's rights secured by the United States Constitution under the Fifth, Thirteenth and Fourteenth Amendment, thereby substaniating a remedy under 42 U.S.C. 1983.

(3) Whether this case is barred by the analogous statutes of California Civil Code of Procedure Section 338(1) three year statutory limitation or is the statutory limitation toll do to

the assertion of fraud under California Civil Code of Procedure Section 338(4).

(4) Whether this case is barred by the principle of res jucata as it relates to Pasadena, Los Angeles, and Compton respondents, where writs of mandate were filed and demurred.

(5) Whether named respondents, acting under the color of state conspired to violate petitioner's rights secured by the United States Constitution.

(6) Whether this case is barred because petitioner did not exhaust administrative remedies available under Title VII of the 1964 Civil Right Act.

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QUESTION PRESENTED

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

EDGAR MOSLEY, PETITIONER

V.

R. NOEL ET AL., RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPINION BELOW

The judgment order of the United States Court of Appeals for the Ninth Circuit, issued without opinion, is set forth in the appendix at pages App. 1-5

The opinion of the United States District for the Central District of California is printed in the appendix at pages App. 1-5

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1986. A petition for rehearing was denied on July 31, 1986, App. 5 The jurisdiction of this court is invoked under 28 U.S.C. 1254 (2&3)

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

(1) The Fifth Amendment of the United States Constitution provides in pertinent part:

... nor be deprived of life, liberty or property, without due process of

law.

(2) The Thirteenth Amendment of the United States Constitution provides in relevant part:

... All persons within the jurisdiction of the United States shall have the same rights in every state and territory ... to the full and equal benefit of all laws and proceedings for the security of the person and property as enjoyed by white citizens and shall be subjected to like punishment. (Civil Right Act 1866 and 42 U.S.C. 1981)

(3) The Fourteenth Amendment of the United States Constitution provides in relevant part:

... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the law.

(4) 42 U.S.C. 1983 Civil action for deprivation of rights provides in pertinent part:

Every person who, under color of of any statute, or ordinance ... cause to be subjected, any citizen of the United States ... deprivation of any rights, privileges or immunities secured by the United States Constitution anc laws, shall be liable to the party injured in action at law.

(5) 42 U.S.C. 1985 Conspiracy to interfere with civil rights provides in relevant part:

If two or more persons in any state or territory conspir ... for the purpose of depriving ... persons of equal privileges and immunities under the law ... the party so injured or deprved may have an action for the recovery of damages occassioned by such injury or deprivation, against any one or more of the conspirators.

(6) Federal Rule of Civil Procedure Section 56(c) provides in pertinent part:

The motion for summary judgment shall be served at least 10 days before the time fixed for the hearing ...

(7) 28 U.S.C. 636 (B)(1)(c) provides in relevant part:

Within ten days after being served a copy, any party may serve and file written objections ... a judge of the court shall make a de novo determination of these portions of the report or specified proposed findings ... to which objections are made.

(8) California Civil Code Section 338(4)

An action for relief on the ground of fraud or mistake, the cause of action in that case is not to be deemed to have accured until the discovery, by th aggrieved party, of the facts constituting the fraud or mistake.

STATEMENT

On August 4, 1983, petitioner, Edgar Mosley, in Pro Se, filed a civil right complaint in the district court of Central California pursuant to 42 U.S.C. 1983. This complaint against approximately fifty defendants alleged that among other things, that these defendants acting uder the color of state law, abused that authority by: (1) Causing petitioner's termination of employment with the Pasadena, Los Angeles, Compton Unified School District without the benefit of statutes that governs the procedures of this matter. (2) Petitioner was denied continuous enrollment in the Education Administration Program at California University Los Angeles without the procedures that regulated the denial. (3) California Employment Development Department deprived petitioner of procedureal benefits in

denying him unemployment benefits. Consequently, the complaint alleged deprivation of rights secured by the United States Constitution, Conspiracy and fraud.

UNITED STATES CONSTITUTION

DUE PROCESS VIOLATION

The records of the administrative hearing of the Pasadena, Los Angeles, and Compton Unified School District's respondents indicates that cause was never established in the dismissal of petitioner. In the state of California cause is delinated by law as it relates to the dismissal of probationary and permanent teachers from the school district. It has been further noticed that the governing board minutes in each of their perspective districts do not indicate any actions concerning the law judges decision or the termination of petitioner from the school districts.

The Administrative Agency incharge of the records of the Pasadena hearing, indicated by documentation that the records of the proceedings were destroyed, App.

The Fifth and Fourteenth Amendment of the United States Constitution state:

> ... nor be deprived of life, liberty, or property, without due process of law ...

Property right as it relates to employment with the school district means reasonable expectation of continuous employment is based on statutes. Young v. Governing Bd. of Onxnard School Dist., 115 Cal. Rptr. 456, 463, 40, C.A. 3d 769, Martin v. Independent School Dist., 569 F.2d 1192 reversed 99 S. Ct. 1062, 440 US 194, 59, L Ed 2d 248. As a result of these rulings petitioner claimed a property right with the district. A

right that can only be relinquish by statutes. Consequently when petitioner was discharged without the benefit of law that governs such matters this constituted denial of due process under the Fifth and Fourternth Amendment of the United States Constitution, which is deprivation of property without due process of law.

Uemployment Development Department of the state of California is also regulation by statutes of the state. When petitioner was charged with collecting unemployment benefits in violation of state law, he was due an administrative hearing to determine if in fact the charges were true. In addition to offsetting the amount of the overpayment when he became eligible for future benefits. In both instances he was denied these rights afforded under California laws and regulations. Therefore petitioner contends

that the agency had no authority to take him to court or to deprive him of future benefits, in that these denials of essential rights constituted deprivation of due process under Fifth and Fourteenth Amendment of the United States Constitution. The deprivation of due process here is atribute to the fact that petitioner had reasonable expectation of the continuation of benefits which he was eligible for, that could only be relinquish by state law.

UNITED STATES CONSTITUTION EQUAL PROTECTION VIOLATIONS

Petitioner contends that when these named public officials did not adhere to the statutes that governs their conduct, he was deprived of equal protection under the Fourteenth Amendment of the United States Constitution which states in pertinent part:

> ... nor deny to any person within its jurisdiction equal protection ...

This segment of the constitution embellish the principle that the laws of the states are intended and directed to treat all of its citizens the same under like circumstances. Peititioner allegations of equal protection violations stems from the fact that he was denied essential statutory mandates that would allow for a just and fair determination in deciding whether petitioner was guilty of the charges level against him as they related to his employment, unemployment and continuous enrollment under California laws and regulations. Consequently, he was treated differently in violation of the Fourteenth Amendment of the United States Constitution under equal protection.

A CLAIM HAS BEEN ESTABLISHED UNDER THE 1983 LAW

Petitioner has setforth that the respondents acted under the color of state law and that as a result of their actions directed toward petitioner, he eas deprived of due process and equal protection secured by the Fifth and Fourteenth Amendment. The above mentioned constitutional violations are the only two essential elements in order to maintain a suit under 42 U.S.C. 1983.

RACIAL DISCRIMINATION

The actions of the respondents constituted racial discrimination in that petition was deprive of full and equal benefits of all laws and proceedings of the state of California. Petitioner was denied the opportunity of him being discharged

from the school districts to be based on the statutues and regulations that governs such matters. This is also true of his being charged with collecting unemployment benefits and denial of continuous enrollment. These statutes and regulations are setforth in California Education Code, Unemployment Insurance Codes, and California Constitution.

In order to maintain a claim under Civil Right Act 1866 now 42 U.S.C. 1981, claimant must show that the conduct of the respondents constiuted "disparat treatment", in context of employment discrimination based on race, "disparate treatment", means simply that on given occassions, one or more employees were treated less favorably because of race, "pattern or practices", means simply that facially neutral policies or decisions have had a different, and adverse impact on employees of a parti-

cular race. Goodman v. Luken Steel Co. D.C. Pa 580 F.Supp. 1114, 1121. Petitioner position is because he was not given full benefit of the law prior to the seizure of his property, he contends that he was treated less favorable because of race. Secondly, that this pattern of deviation from the law while seemly neutral on the face has an adverse impact on the black race.

CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS

Petitioner's allegation of conspiracy is based on the primise that the respondents were aware of the existing statutes and regulations that governs the matter of dismissal of probationary teachers, charging a person with violation of unemployment laws and denial of enrollment. However, the deviation from the law implies that the respondents, who are of reasonable intelligence, made a conscious decision to do

what was not legal or morally acceptable. Therefore it can only be concluded that these respondents' deviation from the law that govern and protect a citizen rights to a fair and just determination constituted conspiracy under federal and state laws. Consequently, petitioner has a claim under 42 U.S.C. 1985.

MAGISTRATE'S REPORT
AND RECOMMENDATION

This matter was assigned to Magistrate Volney Brown. On October 25, 1983, the matter was taken under submission by the magistrate. On November 11, 1983, the magistrate dismissed the Compton respondents with prejudice. App. 6. An act that was beyond his authority. On March 25, 1984, the magistrate file his Report and Recommendation which in pertinent part setforth one or more of the following reasons to hold for the

Pasadena, Los Angeles, Compton, Employment Department and California University. App.

AFFIRMATIVE DEFENSES

1. Petitioner did not state a claim upon which relief could be granted under 42 U.S.C 1983 in that he complained of state violations only.

2. Petitioner case is barred by the principle of res judicata as to the Pasaden, Los Angeles and Compton respondents.

3. Petitioner entered a settlement agreement that released the Pasadena respondents from any and all causes of actions known and unknown.

4. Petitioner claim is barred by California Civil Code of Procedure 338(1) three statutory limitation.

5. petitioner claim is barred by the administrative procedure under Title VII of the 1964 Civil Rights Act.

DEFENSES AND OPPOSITION TO DEFENSES

Petitioner will indicate here when he feels that particular defense applies to one or more of his objections to the magistrate's report in disposing of this case by means of summary judgment pursunat to F.R.Civ.P. 12(b) and 56(c)

1983 STATUTE APPLICABLE TO THIS CASE

The Pasadena, Los Angeles, Compton, California University and California Employment Department respondents claimed as affirmative defense that petitioner did not have a remedy under U.S.C 1983 in that he complained of state violations only which does not constitute deprivation of any rights secured by the United States Constitution.

Petitioner has previously setforth, that in order to maintain a suit under

the 1983 that he was only required to establsih two essential requirements, (1) the respondents had to acting under the color of state (2) he must have been deprived of right secured by the United States Constitution. Petitioner contends that he has met these requirements in his allegations that the respondents actions were under the color of state and his allegations of Fifth, Thirteenth and Fourteenth Amendment violations of the United States Constitution.

RES JUDICATA DEFENSE AND OPPOSITION TO DEFENSES

The Pasadena, Los Angeles and Compton respondents asserted as an affirmative defense that petitioner's claim is barred by the principle of res judicata. Petitioner opposed the defense on the basis of the following:

The affirmative defense for the Pasadena respondents of res judicata does not apply in that an administrative hearing does not constitute this case being heard on its merits in a court of competent jurisdiction. The case in question, Edgar Mosley v. Ramon Cortines et al., App. 26. This case indicates that petitioner filed a writ of mandate in the Superior Court of Los Angeles that was demurred on th basis that the time for filing the claim had expired in accordance to California Government Code Section 11523. The appeals court affirmed on the same basis. This document clearly shows that this case was not heard on any grounds going to the merits of the case. Therefore the principle of res judicata is not applicable in this case.

The affirmative defense for the Los Angeles respondents on the grounds of res judicata does not apply in this case in that because petitioner failed to

appear at the administrative hearing, the case was proven up by the district as default according to United Teacheret al. v. Los Angeles Unified School Dist., App. 42 This case established in pertinent part that in the default proceedings that took place, the district failed to prove a prima faccie case against the petitioner, Edgar Mosley, because "the examination key was not made a part of the administrative record ... that under these circumstances th rebutting proof offered by others as it relates to the petitioner who did not appear cannot be considered. Resulting in this case not being heard on its merits as it relates to petitioner's issues.

The affirmative defense for the Compton respondents on the grounds of res judicata is not applicable in this case because petitioner in the writ filed under Mosley v. Thurmond Johnson et al., App. 110 was not demurred on

any grounds going to the merits. Gabriel v. Borowy 96 N.E. F.2d 243, 244 326 Mass 667. There was no opportunity for discovery , finding of facts or conclusion of law that related to the issues submitted. Consequently,' this cse was demurred on the basis of the judges opinion rather than any issues going to the merits.

The application of res judicata can only be applied in this case if it can be shown by records that the cases in question were heard on the merits in a court of competent jurisdiction. U.S. v. State of Texas D.C. Tex 430 F.Supp 920, 924

APPLICABLE STATUTORY LIMITDON

The Pasadena, Los Angeles, California University and California Employment Development Department setforth as affirmative defense that this case is barred by the applicable California

Civil Code of Procedure Section 338(1) three year statutory limitation, in that the case was filed after the expiration of time had elapse. In Los Angeles the three year statutory limitation does not apply in that a writ of mandate was filed and a decision reached in November of 1980, United Teacher of Los Angeles et al., V. Los Angeles Unified School District No. 326449. This case was not filed until August 4, 1983, well within statutory requirements. Petitioner contends that the other mentioned respondents action constituted fraud as wellas the Los Angeles respondents, there fore the applicable statutory limitation is 338(4) of the above mentioned section.

The fact that petitioner could not substantiate the document mailed to him by the administrators of the respective school districts, through public records, in addition to the numerous deviation from the law petitioner has established

reasonable suspicions that these administrators had in fact committed fraud, which would toll the statutory limitation until the fact constitution the fraud has been discovered. Salveson v. Western States Bankcard Ass's D.C. 525 F.2d 566.

Petitioner contends that California University and California Employment Development Department are accessories to fraud in that these respondents collaboarated with the other respondents in perpetration of denial of petitioner's rights. These allegations of fraud on th part of these respondents is based on the assertion that because they have not setforth any reasons for their action toward petitioner that would suggest otherwise. Therefore these respondents in the absence of a defense, shold be subject to the same liabilities under section 338(4) App. 13

SETTLEMENT AGREEMENT

Petitioner's case is not barred in relationship to the Pasadena respondents as a result of entering a settlement agreement with these respondents. First petitioner never waivered is rights under Civil Code of Procedure Section 1542. Secondly, according to this section, "A general redease does not extend to claims which the creditor does not know or suspect to exist. App. 19, in his favor at the time of executing the release which if known by him must have materially affected his settlement with the debtor". Petitioner was unaware at the time of the settlement that the respondents had committed fraud.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Petitioner's case is not barred because he did not exhaust administrative remedies under the Civil Right Act of 1964, Title VII (EEOC). This law does not

preempt this area of racial discrimin-
in that there are remedies offered under Civil Right Act 1866 now 42 US.C. 1981, that address the issues of discrimination and do not require the exhaustion of any administrative remedies before filing a claim in the federal court. Johnson v. Railway Express Co., 1975 421 US 454, 95 S Ct. 1717.

MAGISTRATE FINAL REPORT

It alleged that on May 22, 1984, the magistrate filed a document entitled "Final Report and Recommendation", of the United States Magistrate, however when petitioner checked the docket sheet this document had not bee filed. It was not filed after petitioner filed his motion for summary judgment on May 23, 1984. The document in question included the Compton respondents who had been dismissed by the magistrate with prejudice and

excluded from the March 26, 1984, report. The magistrate attempted to correct some of the objections made by petitioner in this report. The corrections and final report are irregular in that it is the duty of the district judge to make a de novo determination of any of the issues objected to by petitioner in the report. 28 U.S.C. 636(B)(1)

SUMMARY JUDGMENT: DISMISSAL OF CASE AND APPEAL

On May 23, 1984, petitioner filed for summary judgment pursuant to F.R.C.P 56(a) that was accepted by th law clerk and filed. On May 25, 1984, the district judge adopted the magistrate's "Report and Recommendation", resulting in the case being dismissed on May 30, 1984. App. Petitioner filed an appeal to the United States Court of Appeals for the Ninth Circuit on June 6, 1984, on the following basis.

BASIS FOR APPEAL

Petitioner setforth in his Reply Brief that the district judge did not conduct a de novo determination of any of the matters objected to in the magistrate's report to determine whether the administrative decision supported the evidence in the record. Morgan v. Morris 665 F.2d 900 (9th Cir. 1981) 28 U.S.C. 636 (B)(1)

The district court did not give notice that a summary judgment was pending. The only information that petitioner had, concerning this matter of summary judgment, was that the respondents motion to dismiss pursuant to F.R.C.P. 12(b) may be upheld by the magistrate in his recommendation to the district judge. Consequently, there was not adequate time to prepare or respond nor any opportunity for discovery to further substantiate the record. Arthur v. Crown Zellerbach 662 F.2d 584 ((thCir. 1981)

This case held ... "neither a district court nor app als court is permitted to weigh the evidence, pass credibility or speculate as to the ultimate findings of facts. Consequently because there was no time or opportunity to develop the facts essential to the outcome of the case, the decsion of the appeals court and the district court can only be speculation.

The issues of proper notice and discovery as they relate to summary judgment pursuant to F.R.C.P. 56(c) are firmly established in the Ninth Circuit by statutes and related cases. Protland Retail Druggist Ass's v. Kaiser Foundation Health Plan743, F.2d 1388 (9th Cir. 1981) The decision to affirm in Edgar Mosley v. R. Noel et al., is inconsistent with the Ninth Circuit rulings in the pass and contrary to statutes and related cases, causing the decision to be in conflict with the Ninth Circuit.

Also see Pollar v. Columbia Broadcasting System 368, US 464, 473, 82, S S Ct. 486, 491, 7, L Ed 458

WHY SHOULD THE COURT GRANT RELIEF

The United States Supreme Court has established the precedent in Pollar v. America Broadcasting System supra as the case relates to notice discovery and triabl issues purauant F.R.C.P. 56(c). The decision to affirm on the part of the appeals court is in conflict with established procedures.

CONCLUSION

Petitioner contends that relief shold be grant because there exist obvious conflict in the appeal court decision to affirm.

FOOTNOTE

The defendants are as follow:

The Pasadena defendants:

R NOEL, KATHRYN NACK, HENRY MYERS, MAJORIES K. WYATT, ELBIE HICHABOTTOM, PAUL FINOT, JEAN MILLS, JUANITA MORRIS, VERDELLE REYNOLDS, RICHAR VETTERLI, JOHN HARDY, JEROME MEIER, RAMON C. CORTINAS, and WILLARD CRAFT.

The Los Angeles defendants:

TOM BARTMAN, RITA WALTERS ALAN GERISHMAN, JACKIE GOLDBERG, JOHN GREENWOOD, LARRY GONZELES, ROBERTA WEINTRAUB, LAVERN RICCHIO, ROBERT DURAN, R. W. DUNEVANT, WILLIAM J. JOHNSON, KATHLEEN BROWN, RICHARD FERRARO, BOBBI FIEDLER, and HARRY HANDLER.

The California University of Los Angeles defendants:

GERALD R. RASUSSEN, RALEIGH JACKSON, GEORGE DEUKMEJIAN, JOHN F. O'CONNELL, WALLACE ALBERSON, AND W. Ann REYNOLDS.

The Employment Development Department defendants:

KAYE KIDOO, GLORIA BECERRA, FERD OLSON, LINDA SWARTZ, BEVERLY SKYES, AND YSABEL M. COSTELLO.

The Compton defendants :

SINETTA TRIMBLE, KELVIN FILER, SAM LITTLETON, ELLIS W. COOK, MANUEL CORREA, JOHN STEWARD, BERNICE WOODS, ALTHEA LOIS JENKINS, HELEN DRYER, and THURMAN C. JOHNSON.

BEST A

CERTIFICATE OF SERVICE

On November 17 1986, I served the attached documents entitled, PETITION FOR WRIT OF CERTIORARI, on the interest parties in this action, by mailing a copy to the following.

Nancy O'Hara Deputy County Counsel
648 Hall of Administration
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1801 Ave. of The Stars
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Henry Torres Jr., John Crimmis, Deputy
Atorney General
3580 Wishilre Boulevard
Los Angeles, California 90010
Nina Phillips. Deputy Counsel
Los Angeles, California 90010

I, the under signe, certify and declare that I am over the age of 18, years and not a party to the within action.

I declare under penalty of perjury that th foregoing is true and correct. Executed on November 17, 1986, at Los Angele California.

Karen S. Johnson
Signature of person making servicr

VAILABLE COPY

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDGAR MOSLEY, PLAINTIFF-APPELLANT,	No 84-6046 DC# 83-5039
V.	MEMORANDUM
R. NOE. er al., DEFENDANTS-APPELLEES.	

Appeal from the United States District court for the Central District of California

Hon. Eward Rafeedie, District Judge, Preseding
Submitted June 2, 1986*

Before: Wallace, Hug and Kozinski, Circuit Judges

Edgar Moslry, appearing pro se, brought this action pursuant to 42 U.S.C. 1983 against employees of the State of California and some of its ploitical subdivisions. He appeals the district court's entry cf summary judgment against him. We affirm.

Mosley first contends that his case was improperly reassigned from one district judge to another, Even if his motion to reassign were construed as a motion seeking recusal of the second judge, Mosley has failed to show any prejuudice as a result of the reassignment. Mosley alleges only that the second judge was biased against civil right claims. These allegations are unsupported and cannot provide adequate grounds for recusal. See Mayes v. Leipziger, 729 F2d 605,607 (9th Cir. 1984).

Moslet next contends that he was denied as opportunity to object to the Magistrate's final report and recommendation. See 28 U.S.C. 636 (b)(1). Because Mosley was able to objectto th magistrate's initial findings and recommendations, and

has not been prejudiced by failure to object to the magistrate's final report this error is harmless.

Mosley asserts that the magistrate exceeded his authority in granting the motion to dismiss the Compton Unified School District employees . Although magistrates may not grant motions to dismiss, see 28 U.S.C. 636 (b)(1)(A), the district court's subsequent grant of the sam defendants' motion for summary judgment cured the error. Mosley's contention that magistrates may not consider motions for summary judgment and dismissal is refuted by the plain language of 28 U.S.C. 636 (b)(1) (,agistrate may conduct hearings and make recommendation on such motions).

Mosley nest contends that the district court erred in finding that his

claims against the Compton defendants were barred by res judicta. This contention lacks merit. Mosley previously filed a state court petition for a writ of mandate against these defendants. based on the same claims raise in this action. Denial of the petition was a final judgment on the merit, and therefore badred this action under the doctrice of res judicata. See Trujillo v. County of Santa Clara. 775, F.2d 1359, 1366 (9th Cir. 1985)

Mosley's contention that the district court erred in failing to address his motion for summary judgment is meritless in light of its subsequent grant of the defendants' motions for usmmary judgment. Grant of the defendants' motion necessarily precluded summary judgm nt for mosley.

Finally, Mosley's claims against all but the Compton defendants were clearly barred by the statute of limitation. See Gibson v. United States, 781 F.2d 1334, 1339 (9th Cir. 1986)

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDGAR MOSLEY, Plaintiff-Appellant, v. R. NOEL et al., Defendants-Appellees.	)	No 84-6046 ORDER

Before: WALLACE, HUG AND KNZINSKI,
Circuit Judges

Appellant's petition for rehearing is denied.

July 31, 1986 FILED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDGAR MOSLEY, Plaintiff, v. R. NOEL KAYTHRYN NACK HENRY MYERS, et al., Defendants.	CASE NO. CV-83-5038 ORDER

This civil rights action was initiated by the pro se plaintiff on August 4, 1984, against, inter alia, Sinetta Trimble, Kelvin Filer, Sam Littleton, Ellis W.Cook, Manuel Correra, John Stwward, Bernice Woods, Althea Lois Jenkings, Helen Dryer and Thurman C. Johnson, each associated with the Compton Unified School District. An amended Compalint was lodged October 25, 1983, after a number of pleadings responsive to original complaint had been served.

See Rule 15(a), F.R.Civ.P.

The aforesaid "Compton" defendants moved to dismiss osr. in the alternative, for a more definite statement, or the grounds, among others, of failure to state a claim upon which relief as to them can be granted. The motion presents "matter outside the pleading," most notably material from the files of the Superior Court of Los Angeles County, as a consequence of which the Magistrate treats it was one for summary judgment to be disposed of as provided by Rule 56, F.R.C,P. Rule 12(b), Rule 12(b), F.R.Civ.P.

Summarized, the complaints and exhibits on file show that plaintiff was employed by the Compton Unified School District for the school year 1980-81 and 1981-82 as a certivicated teacher. Amended Complaint, page 32. He was told that the

position for which he applied was "temporary" because it existed because another teacher was "on leave working in categorically funded programs." Complaint, page 25. He was terminated when he refused to sign the Temporary Contract Form. Amended Complaint. page 87. He maintains, however, that he was hired "without a contractual agreem nt on February 2, 1981, and therefore is entitled, under Education Code Section44916 to classification as a probationary employee because no writing indicated the "temporary nature of the employment". Plaintiff himself has alleged, however, that he was hired on said date pursuant to Personnel Status Notice, Exhibit "B" to defendants' said motion. This writing sufficiently states the temporary nature of the employment as Long Term Substitute Teacher, It is

alleged that the California Court of A Appeal, in American Federation of Teachers v. Board of Eduation, 77C.A. 3d 100, was "without authority" to hold that, as here, school district, "may employ teachers as temporary employees to take the placeof tenure or probationary ... employees who have taken leave from their regular assignments in order to work in a catagorically funded project." Complaint, pp. 28-29. The actions of the Compton defendants, it is alleged, denied plaintiff "equal protection" and otherwise violated the laws and Constitution of the stat of California and the United States.

Substantially identical allegations were made and issues were framed in Los Angeles Superior Court action No. C479885, Mosley v. Thurmond Johnson, et al., per

this plaintiff's Second Amended Peition for Writ of Mandate, Exhibit "A" to the subject motion. A certified copy of Minute Order in said Superior Court action is before this Court as Exhibit "1" to the Compton defendants' Memorandum of Points and Authorities dated October 13, 1983, significantly providing: "The administrative record is received in evidence by reference. The petition is argued and denied."

Thd subject motion was fully argued before the Magistrate on November 22, 1983, The parties agreed inopen court that the aforesaid ruling of the Superior Court apparently never was formalized by the filing of a formal judgment. The record does show that plaintiff, however, first filed an appeal therefrom to the California Court of Appeal which hd then voluntarily

dismissed.

It is ORDERED that this action is dismissed with prejudice as to each of the said moving Compton defendants. This action as to the moving defendants is barred by the res judicata effect of the California state court decision, which is either a final judgment or can be made a merely ministerial act. See Cutting Fruit Packing Co., v. Canty 141 Cal. 692, 696-7 (1904). State judgments are entitled to full res judicata effect in federal civil rights litigation. Allen v. McCurru, 449 U.S. 90 (1980). Otherwise stated: "When a party seeks relief in state court for an alleged wrong. he is thereafter barred from seeking relief on constitutional grounds from the same defendants, for the same wrong, in federal court. "Rutledge, v. Arizona Board of

Regents, 660 F.2d 1345, 1351 (9th Cir. 1981), Affirmed, ___U.S. ____, 103S.Ct. 1483.

The Magistrate notes pafenthetically that although plaintiff includes a 42 U.S.C. 2000e allegation in his complaint (Complaint, page 30), it is meaningless for his failure to allege exhaustion of his administrative remedy, a remedy which in open court he has admitted he did not and noe eannot exhaust. See 42 U.S.C. 2000e-5(d) and (e); Love v. Pullman Co404 U.S. 522, 524-25(1972)

DATED: November 28, 1983

Volney V. Brown Jr.
United States Magistrate

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EDGAR MOSLEY, Plaintiff, v. R. NOEL, KAYTHRYN NACK, HENRY MYERS, et al., Defendants.	) CASE NO. CV 83-5039-ER(B)) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This report and Recommendation is submitted to the Honorable Edward Rafeedie, United States District Judge, pursuant to the provisions of 28 U.S.C. 636 (b)(1)(B) and Central District of California.

This civil rights action was initiated by pro se plaintiff on August 4, 1983, against apporximately fifty (50) defendants asociated with the Pasadena Unified School District, the Los Angeles Unified School District, the Compton Unified School District, the California State

University at Los Angeles, and the Employment Development Department. An Amended Compalint was lodged October 25, 1983, aft r a number of pleadings responsive to the original complaint had been served, permission to file having been denied pursuant to Rule 15(a), F.R.Civ. P. Plaintiff's effective pleading, therefore, remains his original complaint, but the Magistrate may and does take representations in the Amended Complaint into account.

The above-named defendants moved to dismissed or, in the alternative, for a more definite statement, on the grounds, among others. of failure to state a claim upon which relief can be granted. The motions present " matter outside the pleading", including materials from the files of the Los Angeles Superior Court,

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as a consequence of which the court treats them as ones for summary judgment to be disposed of as provided by Rule 56, F.R.Civ.P. Rule 12(b), F.R.Civ.P.

Plaintiff has characterized his 42 U.S.C. 1983 action as a "complaint for equitable relief in connection with employment priactices" in that defendants caused his t$_e$rmiation from the school districts due to race, denied him his constitutional right to continued enrollment in the Educational Administration Master Degree program, denied him unemployment benefits that were property right, Complaint, P.

Compton defendants [1] moved to dismiss or, in the alternative, for a more definite statement, and upon papers filed and arguments heard in open court, by Order dated November 28, 1983, this motion was granted dismissing the said

defendants from the action with prejudice.

The first of the four pending motions for summary judgment has been brough by defendants associated with the Pasadena Unified School District. [2] The motion is good.

Plaintiff was employed by the Pasadena Unified School District, as a probationary certified employee, for the school years 1973-74, 1974-1975, 1975-1976. Complaint, p. 13. The school district began termination proceedings in March, 1976, pursuant to California Education Code Section 44949 [3] plaintiff was so notified on March 12, 1976, and he then requested an administrative hearing on March 17, 1976. Amended Complaint, Exhibit C, "In the matter of the Accusation Against: Edgar Mosley." On May 24, 1976, Administrative Law Judge Helen Gallagher rendered a propswed decision

determining cause did exixt not to re-employ plaintiff for the upcoming 1976-1977 school year, and that the statutory procedural due process requirements of Education Code Section 44949 were substantially met by the district. Id. This proposed decision was adopted by the district on May 28, 1976, and plaintiff was duly notified he would not be reemployed for the ensuing school year. Defendant Motion to dismiss, p. 6.'

On August 24, 1976, plaintiff, through counsel, filed a verified petition for writ of mandate against Ramon C. Cortines, Superintendent, and the Pasadena Unified School District, Superior Court No. C 171 607, seeking to overtune the district's decision that he not be reemployed. Id., Exhibit A, Edgar Mosley v. Ramon Cortines and Pasadena Unified School District 2d CIV. No.

50733. The District successfully demurred on grounds the action was barred by applicable statute of limitations [4] and on September 30, 1976, the Superior Court entered an Order of Dismissal of plaintiff's action. Id, at 6. Exhibit A. Plaintiff's Motion for Reconsideration, filed November 9, 1976, was denied November 22, 1976, Id. Plaintiff then appeal from the Order of Dismissal and the Superior Court's denial of the Motion for Reconsideration. Defendant's Motion to Dismiss, p.6. On December 1, 1977, the Court of Appeal, in Edgar Mosley v. Ramon Cortines and Pasadena Unified School District , 2d CIV No. 50733, Id., Exhibit A, affirmed the judgment and order of dismissal entered b Superior Court in favor of the school district and against plaintiff.

On May 2, 1978, plaintiff, through counsel, filed a civil rights action in United States District Court, Central District of California, Edgar Mosley v. Verdelle Reynolds, et al., CV78-1686-DWW(Sx). [5] alleging discrimination in his termination from emplyment with the Pasadena Unified School District in 1976. A first amended complaint for "equitable relief in connection with employment practices" was filed June entered into a Settlement Agreement and a stipulation was filed and entered on September 7, 1979, that the case be dismissed with prejudice.

The pertinent terms of the Settlement Agreement state that in consideration for $4,500.00, plaintiff Edgar Mosley(1) releases and discharges defendants and successors from any and all causes of action, claims arising from

facts in this action, (2) authorizes his attorney to enter a Stipulation of Dismissal with Prejudice in the action. (3) waives his rights under California Civil Code Section 1542, [6] and (4) understands th Agreement is binding. Amended Complaint, Exhibit E.

Plaintiff asserts jurisdiction [7] under 42 U.S. U.S.C. Section 1343 and 42 U.S.C. 1983 alleging Fourteenth Amendment violation of 42 U.S.C. Section 2000e-2. He however, failed to state a claim upon which relief can be granted under thses statutes, and the Court is without proper subject matter jurisdiction.

42 U.S.C. Section 1983 does not grant jurisdiction but merely provides a remedy in cases where jurisdiction is present pursuant to 28 U.S.C. Section 1343. Giles v. Equal Employment Opportunity Commission

520 F.2d 1198,1199 (ED Mo., 1981). "28 U.S.C. 1343 (3) and (4) allow a plaintiff to institute a suit in a federal forum, only if it is claimed that the constitutional rights of the plaintiff were violated by officials acting under state law ..." Id. Plaintiff, therefore, would be able to allege jurisdiction under section 1343 only if he were able to show the violation of a specific constitutional right by persons operating "under color of state law."

Even if the Court construed valid assertion of jurisdiction under 1343, it would still be necessary to determine if allegations in the complaint state a proper claim upon which relief can be granted inder 1983. In order to establish a claim under the latter section, plaintiff must prove two essential elements: (1)

deprivation of a right secured by the Constitution or laws." and (2) defendant's conduct was "under color of state law." Paratt v. Taylor 451 U.S. 527 (1981); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)

Plaintiff alleges the District failed to follow Education Code procedures resulting in denial of equal protection as he was "never afforded the same opportunities and procedures used in dismissing others" and that he was deprived .... of procedural due process. " Complaint, p. 17. While these allegations are vague, general and conclusionary, the court is mindful of the liberal pldading policy underlying the Federal Rules of Civil Procedure. While a pro se civil rights complaint, however, must be liberally construed, Haines v. Kerner, 404 U.S

519 (1972); Thomas v. Younglove 545 F.2d 1171 (9th Cir. 1976), the allegations in a complaint cannot be merely conclusory. Sherman v. Yakahi, 549 F.2d 1287, 1290 ((th Cir 1977); Martin v. Aubuchon. 623 F.2d 1282 (8th Cir. 1980). Specific facts must be all ged in order to avoid dismissal. Kaylor v. Fields, 661 F.2d 1177 (8th Cir. 1981).

Plaintiff alleges violation of only state statutes and procedures [8] and has failed to identify any violation of federally protected rights. Being unable to show such a violation of a federally portected right, plaintiff has failed to state a proper claim under 43 U.S.C. Section 1983.

Plaintiff's unfair employment practice allegation under Title Vii of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2 et

al., is that "defdndants directed actions against plaintiff because he is black male." Complaint, p. 18. The allegations is unsupported by any specific facts, is totally conclusionary, and plaintiff fails to show he has met the statutory prerequisites in order to propely bring a claim under this statute. See 42 U.S.C. 2000-5(d) and (e). " ... The authorization in Title VII commencement of a civil action is limited to a ninety-day period after the statutory notice of right to sue has been held to be jurisdictional. Wong v. The Bon Marche, 508 F.2d 1249 (9th Cir. 1975), ... "Weills v. Caterpillar Tractor Co., 553 F.Supp, 640, 642 (N.D.Ca., 1982). (See also Mohasco Corp. v. Silver 447 U.S. 807 (1980) concerning need to adhere strictly to statutory prerequisites) Plaintiff neither applied for nor received an EEOC right to sue letter. The Pasadena claim cannot, therefore, be maintained under Title VII

Even if plaintiff were able to state proper claims under 42 U.S.C. Section 1 1983, 2000e, th Pasadena defendants would be entitled to judgment on their affirmatively pleaded defense of the statute of limitations. 42 U.S.C. Section 1983 does not contain a limitation period. Consequently, federal courts borrow the state cause of action, e.g., Ward v. Caulk, 650 F.2d 1144, 1147 (9th Cir. 1981). The appropriate state statte for actions under 1983 is California Code of Civil Procededure Section 338(1), 9/ which requires filing suits within three years. Id., Briley v. California, 564 F.2d 849, 854 (9th Cir. 1977). To determine when the cause of action accrues, however, the courts look to federal law. Bong v. Chief of Police, 669 F.2d 587 (9th Cir 1982) Cert. denied, ____U.S. ___;103 S. Ct. 109 (1982). Under federal law, a cause of action generally accrues when

a plaintiff knows or has reason to know of the injury that is the basis of the action. Cline v. Brusett, 661 F.2d 108, 110 (9th Cir. 1981)

The alleged wrongful Pasadena acts of which plaintiff complains occured from March, 1976 through May, 1976. Plaintiff was informed of the District's decision not to reemploy him on May 28, 1976. This civil right action was filed August 4, 1984, more than seven years later. His 42 U.S.C. Section 1983 claim, therefore, was untimely filed and barred by the running of the applicable statute of limitations.

Plaintiff's Pasadena claims are also barred by the res judicata effect of the California state court decisions and previous federal court decisions.

State judgments are entitl d to full res judicata effect in federal civil right litigation. Allen v. McCurry, 449 U.S. 90

(1980). Otherwise stated: "When a party seeks relief in state court for an alleged wrong, he is therafter barred from seeking relief on constitutional grounds from the same defendant, for the same wrong, in federal court." Rutledge v. Arizona Board of Regent, 660 F.2d 1345, 1351 (9th Cir. 1981). affirmed on other grounds sub nom. Kush v. Rutledge, __U.S. __, 103 S.Ct. 1483 (1983). "Under res judicata a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Cromwell v. County of Sac 94 U.S. 351,352. Allen, supra at 94. 28 U.S.C. 1738 provides statutory authority for the rule all federal courts are to give preclusive effect to state court judgment.

Plaintiff has continuously litigated and relitigated this case in both state

and federal courts. In the previous federal action, the parties entered into a Settlement Agreement dated July 22, 197 and stipulated the case be dismissed with prejudice. Such Agreement and dismissal preclude maintenance of this action against the Pasadena defendants.

Plaintiff contends the doctrine of res judicata is inapplicable because, while he admits to filing a complaint in state court, " ... the case was never heard on its merits resulting in no determination of issues or the facts submitted." Plaintiff had a full administrative hearing, pursuant to the provision of the Education Code, and sought to use the courts to overturn that decision. The Superior Court's Order of Dismissal was entered as a result of the defendant District's successful demurrer on the grounds of applicable statute of limit-

ations. This dismissal was appealed, and again, plaintiff failed in his attempt to overturn the Court's decision. In Southern Pacific Transp. v. P.U.C. of State of California, No 82-4466, Slip Op. at 4752 (9th Cir. Sept. 27, 1983), the "California supreme court denied writs of revies of decisions of the California Commission," and stated,"that is a denial on the merits and is to be given res judicata effect in federal courts. The Pacific Telephone & Telegraph Co v. Public Utilities Commission, (9th Cir.. 1979) 600 F.2d 1309, 1311-1312 (sic); see 28 U.S.C. Section 1738." Id.

Plaintiff's inability to properly to state a federal claim, the statute of limitations, and the doctrine of res judicata are, therefore, reasons to hold for Pasadena defendants.

The second of the pending motions for summary judgment is made in behalf of the defendants associated with the Los Angeles Unified School District. 10/ This motion is good.

Plaintiff was employ d by the Los Angeles Unified School District for the 1979-1980 school year as a probationary certified teacher under a conditional contract. Complaint, p. 19. Due to a teacher shortage, the district hir3d plaintiff (and other persons) as an elementary school teacher without his having pawwed th the required subject matter esamination. The district agreed to hire, and rehire plaintiff as a probationary employee for the following school year, on the condition he take and pass the required examination some time during the 1979-1980 school year. Plaintiff signed such a conditional

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employment contract [11] on July 7, 1979. L.A. Motion to Dismiss, p.6. Plaintiff failed to pass the requir3d examination. On March 6, 1980, he received notice "his services would not be continued, " and on March 12, 1980, he requested an administrative hearing. Complaint, p. 19. [12] Plaintiff failed to appear at the hearing held April 21, 22,23,24, 1980, and the case against him was proven up by the district. L.A. Motion t Dismiss, p. 6; See also "In the Matter of the Accusations Against: ... EDGAR MOSLEY, et al," No L-21303, dated April 30, 1980, and attached to Amended Complaint a Exhibit L.

The Administrative Law Judge, Ronald M. Gruen, ruled plaintiff was denied due process as the District refused to make public its examination, but the District refected the decision and notified plaintiff on May 15, 1980 f the decision he

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would not be reemployed. Complaint, p. 20; L.A. Motion to Dismiss, p. 6. Plaintiff then brought suit in Los Angeles Superior Court seeking to voerturn the district decision of dismissal. See L.A. Motion to dismiss, Exhibit A: United Teachers-Los Angeles Donald C. Burgio, et al. vl Los Angeles Unified School District, No C 326449, Memorandum of D cision, filed November 2, 1980. The Court ruled, "... the District has clearly sustained its burden of proof with respect to petitioner ... Mosley; substantial evidence supports their decision." See page 9 of Exhibit A, Memorandum of Decision.

Again thes Los Angeles defendants, plaintiff alleges similiar, as against the Pasaden defendants, due process and equal protection violations, and violation of 42 U.S.C. Section 2000e-2. For the reasons and upon the authorities already mentioned

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he has again failed to state a claim upon which relief can be granted undr the statutes, and this Court is again without proper subject matter jurisdiction.

Even if the Court construed valid assertion of jurisdiction, under section 1343, plaintiff is unable to state a federal claim under 42 U.S.C Section 1983 as, at best, his general allegations contend violation of only state statutes and procedures. While, however, this court need not reach a conclusion regarding plaintiff's state procedureal due process concern with the District's examination, his constant and consistent reiteration of the issue demands some discussion.

Plaintiff protests the use of the examination and contends failure to pass the probationary examination does not

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constitute "cause" for termination within the meaning of Education Code Section 44932 [13] and, this is a violation of due process and equal protection. The issue, however, is not the examination pe se, but whether or not plaintiff complied with the District contract terms. [14] Should the examination be the issue, there is both case law and statutory authorization for such a contract condition.

Plaintiff's procedural rights and cause determination are more appropriately argued under Education Code Section 44949 (See footnote 3), which incorporates the "cause" provisions of rights of temporary employees and the use of the examination:

"... Any such employee shall be re-employed for the following school year to fill any vacant positions in the school district for which the employee is

certified to serve.

"For purposes of this section, qualified to serve shall be defined to mean the possession of an appropriate credential plus completion of an appropriate credential plus completion of appropriate academic preparation or experience in the subject matter in which the vacant position occurs ...

"In any district in which appointments are made from eligible lists established by examination, special eligible lists shall be established at the end of each school year which consist of the names of those employees who meet the requirements of this section. Such lists shall be in rank order based on the final scores established by examination ..."

The Court ruled on the issue of the examination as a contract condition and the failure to pass such an esamination as

cause for termination under Education Code SEction 44949(d) in Alba v. Los Angeles Unified School District, 140 Cal. App. 3d 997, 189 Cal. Rptr. 897 March, 1983. In a case factually similiar to the case at bar, the Court found the condition of passing an examination reasonable and ruled:

> "We are of the view that respondents' failure to pass the examination testing their skillsin their subject fie field of teaching bears directly on their competency as teachers and further that the welfare of the district's students would be affected by the retention of teacherso who are unable to demonstrate their compegency by sucessfully passing a competency examination in the field they are engaged in to teach. The fairlure of the respondents to pass

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> The District's examination in the subject field of teaching constituted cause for not reemploying them under section 44949, subdivision (d)." Alba, 140 Cal. App. 3d at 1009; 189 Cal. Rptr. at 905

Plaintiff's unfair employment practice allegation under Title VII of the Civil Right Act of 1964. 42 U.S.C. 2000e -2 et al, is, as was the case with the Pasadena defendants, unsupported by specific facts, totally conclusionary, and fails to allege the prerequisites to filing suit under this statute; i.e., timely filingof a complaint with the EEOC deferral to the appropriate state agency, and receipt of a right to sue letter. Wong, supra. However, plaintiff argues the examination's adverse racial impact shows it to be an unlawful employment practice in violation of this code

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section. "The probationary test given to plaintiff has an adverse racial impact in that, scores were not used to determine whether employees had a minmum amount of knowledge n cessary to teach but was also used to rank employees according to their scores where only those wisth a passing score were selected for probationary status and those with failing s scores classified as substitutes violating United States Code 42 S_ction 2000e ..." Complaint, p. 23. Plaintiff has fa failed to allege any facts indicating suc such an adverse racial impact that would resumably be a Fourteenth Amendment violation. In Washington v. Davis, 426 U.S. 229 (1976), the Court held that a chaim of adverse impact alone is insufficient to raise a Fourteenth Amendment violation, and absent a showing of

intentional or purposeful discrimination there is no violation of constitutional equal protection standards. Plaintiff has failed to show any intentional discrimination on the part of the defendants.

Even if plaintiff were able to state porper federal clains, recovery nevertheless would be precluded by the pleaded affirmative defens of the statute of limitation and the doctrine of res judicata.

As previously discussed with the Pasadena denfendants and under the authorities cited on pages 9-10, the applicable state statute of limitations under 42 U.S.C. Section 1983 is California Code of Civil Procedure SEction 339(1), which requires filing suits within three years. The alleged wrongful acts of which plaintiff complains as to Los Angeles defendants ocurred from July 1979 through May 1980. Plaintiff was informed of the district's

decision not to re mploy him on May 15, 1980. This civil rights action was filed August 4, 1983, more than three years after his notice.

To argue he is well within the tme frame of the applicable statute limitations, plaintiff cites California Code of Civil Procedure Section 312 which states, "Civil actions without exception, can be commenced within the periods prescribed in this title, after the cause of action shall have accured, unless where, in special cases a different limitation is prescribed by statute." Plaintiff urther argues the cause of action does not accure until the judgment becomes final. and since the Superior Court dod not issue a decision until November, 1980, he is within the applicable time period. Plaintiff's Second opposition, p.3. This is an improper reading of section 312 and an incorrect conclusion.

California Code of Civil Procedure Section 338, providing a three year limitation period for commencement of actions under liability created by statute, must be read in context with California Code of Civil Procedure Section 312 which provides that civil actions can only be commenced within periods prescribed, after the cause of action has accrued, unless specific cases have different statutory limitation periods. Travelers Express Co., Inc. v Cory, 664 F.2d 763 (9th Cir. 1981). Therefore, the three years limitation peroid is applicable and the claim is properly barred.

State judgment are entitled to full res judicata effect in federal civil rights litigation under authorities cited at pages 10-11. Where there has been a final judgment on the merits, the principles of res judicata preclude a party from bringing a claim arising out of the same incident,

and precludes suit based on all issues raised on a prior suit, as well as all issues that could have been raised in the prior suit. In the Superior Court case, United Teacher-Los Angeles Donald C. Burgio et al. v. Los Angeles Unified School District, decided November 20, 1980, the Court ruled the probationary examination was fair, plaintiff received notice May 15, 1980 pursuant to Education Code 44949, and substantial evidence supported plaintiff's dismissal. All of plaintiff's additional claims, including the questions of "cause" pursuant to Education Code 44948, 44949 and44932, and his federal constitutional claims could have been raised in the prior state court proceeding. They were not and litigation of the claim is porperly precluded.

The third of the pending motions for

summary judgment is made in behalf of the defendants associated with the California State University-Los Angeles. 15/ This motion is good.

Plaintiff asserts he was enrolled in the Master Degree program in Educational Administration of California State University-Los Angeles from March 1975 through December 1976. Complaint, p.32. In december 1976, he received notice that he could not be permitted to continue enrollment as he did not meet certain unspecified minimum requirements. 16/ Id Plaintiff resumed his studies in Educational Administration in September, 1979, and eventually received a Master's degree in June, 1980. 17/

Plaintiff's section 1983 claims allege violation of the Fourteenth Amendment in theinterference of his right to a contin-

uing enrollment and in the collaboration "with the defendants of the school district in their acts of discrimiation and unfair employment practices."

Plaintiff has again failed to state a claim upon which relief can be granted and this Court is again without porper subject matter jurisdiction. Even if the court construed valid assertion of jurisdiction, under section 1343, plaintiff is unable to state a federal claim under 42 U.S.C. 1983 as, at best, his general allegations contend violation of only state statutes and procedures. Plaintiff has failed to allege facts showing how the right to either admission to, or continuous enrollment in, a graduate program rises to the level of a constitutionally protected right. Should plaintiff argue against the constitutionality of the admission and/or enrollment policies of the California State

University system, he should utilize proper state administrative channels and necessary state remedies. Additionally, the allegations are mere conclusions, unsupported by facts, and insufficient to state a proper claim. Sherman, supra, et al.

The "mere" allegation that defendants "collaborated" with the other school district defendants is also conclusionary and insufficient to state a proper claim. Keniston v. Roberts, 717 F.2d 1295, 1300 (9th Cir. 1983); Sherman, supra. The allegattion is insufficient even ifit is construed as an attempt to plead the existence of a civil conspiracy as

> ..."the conspiracy itself is not a cause of action, without overt acts, because again it is the overt act which moves the conspiracy from the area of thought and conversation in-

> to action and causes the civil injury and resulting damage, Accordingly, the cases hold that the damage in a civil conspiracy flows from the overt acts and not from the conspiracy.

Therefore, the certainty we look for in a proper complaint under the Civil Right Statutes, is not in the general allegations of conspiracy, purpose, intent and color of authority but the certainty and substance in the particular acts which are alleged to have caused damage." Hoffman v. Halden, 268 F.2d 280,295 (9th Cir. 1959) also Furumoto v. Lyman362 F.Supp. 1267, 1274(N.D.California, 1973).

The state statute of limitation which requires filing suits within three years, California Code of Civil Procedure 338(1) is also applicable to this section 1983 action under authorities cited as pages 9-10. The alleged wrongful act of plaint-

iff complains, the refusal to permit him to continue his education, occuredin December, 1976. This civil rights action was filed August 4, 1983, more than seven years after he received notice of his "de-enrollm nt." The action is, therefore untimely filed and the claim is barred as a result of defendants' timely assertion of the statute of limitations as an affirmative defense.

The fourth of the pending motion for summary judgment is made on behalf of defendants associated with the California Wmployment Development Department. 18/ This motion is good.

A careful reading of the pleadings and exhibits shows that on November 16, 1979, plaintiff received a "Notice of Intent to Request Criminal Complaint." from the California Employm nt Development Department, advising him of prosecution for

violation of California Unemployment Insurance Code Section 2101. [19] Amended Complaint. p. 28; Exhibit N1. On or about February e, 1980, plaintiff was convicted in Minicipal Court of violation of Unemployment Insurance Code Section 2101, put on two years probation, orderd to make restitution in the amount of $i,465.00, and subjected to the ineligibility porvisions of Unemployment Insurance Code Sections 1263(a), 1263(b), and 1379. [20] On or about June 12, 1980, plaintiff received a "Notice of Overpayment" document showing the $1,465.00 amount of overpayment and that the decision was final unless an appeal was filed by July 2, 1980. Amended Complaint, p. 30: Exhibit O. plaintiff's unemployment claims filed in November, 1980 and November, 1982 to offset the overpayment were denied. Complaint, p. 34; Amend Complaint, Exhibit N2.

Plaintiff alleges Fourteenth Amendment violation of due process and equal protection in that he was denied the

required administrative hearings to question the overpayment charge and was unable to use the November, 1980 claim to offset the alleged overpayment. Additionally, plaintiff contends he was denied benefits due to his race and the California Employment Development Department's collaboration with other defendant school districts.

Plaintiff has again failed to state a valid federal claim and this court is again without proper subject matter jurisdiction. Even if the Court construed valid jurisdiction, under section 1343, plaintiff's general allegation, at best, contend, once again, violation of only state statutes and procedures.

To contest the overpayment allegation and "offsett" procedures utilized by the Department, plaintiff must utlize state administrative channels and necessary state remedies. This Court is without propper jurisdiction as plaintiff failed to pro-

perly exhaust administrative remedies. The remedy at law in state court is petitioning the Superior Court for a writ of manadamus pursuant to California Code of Civil Procedure Section 1094.5 "(a) where a writ is issued for the purpose of inquiring into the vlaidity of any final administrative order or dedision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken ... the case shall be heard by court sitting without a jury ..." plaintiff also has an appeals remedy in Unemployment Insurance Code Section 1377 21/

Plaintiff may argue there is not exhaustion of state administrative remedies requirement as a prerequisite to a 42 U.S.C. 1983 action. Patsy v. Board of the State of Florida, etc., 457 US 496, 102 S. Ct. 2557 (1982). While this is accurate, plaintiff has failed to allege a valid section 1983 claim and has

and has possibly alleged only state claim which is subject to an exhaustion of administrative remedies requirement. Plainitff received notice of appeal procedure on the 1980 "Notice of Overpayment" document, in a 1982 letter from the Assistant Manager of the Pasadena Branch of the Employment Development Department (See Amended Complaint, Exhibit O), and in a 1982 Determiation of Eligibility Document (See Am nded Complaint, Exhibit N2) An administrative hearing for an appeal was set for August, 1982, but plaintiff failed to attend. Amended Complaint, p. 31. Administrative remedies have not been exhausted.

The conclusionary allegation that defendant Department "collaborated" with the school district defendants to deny plaintiff benefits is factually insuff-

icient to state a proper claim under authorities cited at pages 22-23. Plaintiff must plead not only a conspiracy but also praticular overt acts that caused the damage, Hoffman, supra Plaintiff has failed to plead with such specificity.

The individual Department defendants are immune from suit and/or damages arising out of the good faith and reasonable exercise of their administrative duties. Qualified immunity shields the individuals "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, et al., supra at 801, 818; Schmidt v. Oakland Unified School District. 662 F.2d 550 (9th Cir. 1981). Notices were

sent plaintiff, and decisions made regarding overpayment procedures, according to established state law and state procedure.

THE MAGISTRATE FINDS by reasons of the foregoing the defendants' motions for summary judgment should be granted.

WHEREFORE, THE MAGISTRATE RECOMMENDS that an order be issuedby the Court (1) approving and adoping this Report and Recommendation. and(2) directing that judgm nt be entered dismissing this action with prejudice.

DATED: March 23, 1984.

Volney V.Brown Jr.
United States Magistrate

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

EDGAR MOSLEY, PETITIONER-APPELLANT, V. RAMON C. CORTINES and PASADENA UNIFIED SCHOOL DISTRICT, Defendants-respondents.	2D CIV. No. 50733 Superior Ct. No. C 171 607

BY THE COURT:

APPEAL, from a judgment and an order denying reconsideration of the Superior Court, Los Angeles County. Norman R. Dowd, Judg, Judgment affirmed; appeal from order dismissed.

Jefferson, Hopkins &Reed and Lee M. Reed for Petitioner and Appellant.

John H. Larson, County Counsel, and Donovan M. Main, Deputy County Counsel,

for Defendants and Respondents.

Before Cobey, Acting P.J. , Allport, J., and Potter, J.

On August 24, 1976, Edgar Mosley (Mosley) filed a verified petition for writ of mandate against Ramon C. Cortines, Superintendent of the Pasadena Unified School District (Cortines), and the Pasadena Unified School District, a Municipal Corporation (District), alleging that he was a probationary teacher of District; that pursuant to section 13443 of the Education Code respondents were required to notify petitioner by May 15, 1976, that he was rehired, but a continuance was granted under section 11524 of the Government Code and the notification date was extended to May 28, 1976, and June 7, 1976; that Cortines had a duty to notify Mosley

that he was rehired presonally or by registered mail by May 28, 1976; that on May 28, 1976, by written decision the Board of Trustees of District decided not to rehire Mosley; that no notice was werved on Mosley of such decision until June 5, 1976. Attached to the petition and incorporated therein by reference as exhibit A was effective May 28, 1976. The petition did not allege that Mosley had thereafter requested a copy of the record.

Cortines and District interpose a demurrer to the petition for writ of mandate on the ground that the petition was barred by the provisions of Government Code section 11523 and on the ground that the petition did not state facts sufficient to state a cause of action.

On September 21, 1976, Mosley filed a supplemental petition for writ of manate in which he alleged that under Education Code section 13443 a probationary teacher was entitled to receive a summary evaluation of "Do NOT RETAIN" from District on or before February 15 of the effective year, but did not receive any such notice until March 12, 1976; that the notice which he did receive was merely a letter from Cortines indicating that he was going to recommend to District that Mosley not be retained, and that a hearing thereon which should have been schedule on or before April 15th was not heard uhtil April 29 and 30.

In a memorandum of points and authorities in opposition to the demurrer filed by Cortines and District, counsel for Mosley declared that he was in error

in alleging in the petition for writ of mandate that Mosley received notice of District's decision on June 5, 1976, and that in fact District did not give such notice until June 7, 1976.

By order dated September 30, 1976 the trial court ordered the petition for writ of mandate dismissed.

A motion for reconsideration was filed November 9, 1976, and denied November 22, 1976.

In a declaration in support of the motion to reconsider the order dismissing the petition for writ of mandate, counsel for Mosley declared that on June 8, 1976 he and Mosley appeared before District's governing board and requested that it reconsider its decision of May 28, 1976; that thereafter he never received notice of any decision on his

request for reconsideration.

The court's minute order denying the request for reconsideration read: " ... In oral argument, petitioner's counsel acknowledges that petitioner received written notice of the Board's final action, including findings, more than 30 days before the action (sic) denied."

Notice of appeal from the order of dismissal dated September 30, 1976, and the order denying reconsideration dated November 22, 1976, was filed on November 29, 1976.

ISSUES

Appellant contends that the order (which has the effect of a judgment) dismissing his petition for writ of mandate is against the law because:

A. District never complied with Edu-

cation Code section 13443, thereby denying Mosley his constitutional right due process and consquently the rule requiring judicial review within 30 days never came into effect.

B. District has never made a recommdation and has never given notice to Mosley or his counsel as required by Education Code section13443.

DISCUSSION

The first question before this court is whether or not the petition for writ of mandate alleged facts sufficient to state a cause of action for judicial review or whether the petition affirmatively alleged that the right to judicial relief which Mosley sought was barred by the provisions of Government Code section 11523.[1]

Section 11523 applies to actions by probationary teachers for reinstatement. (Eichman v. Escondido etc. Sch. Dist. 1964) 61 Cal. 2d 100.

The allegations of the petition are clear that District's governing board made its decision not to reemploy Mosley on May 28, 1976, and that decision expressly provided that it should be effective on May 28, 1976. Under Government Code section 11521, 2/ the district's power to reconsider its decision expired 30 days after May 28, 1976. i e., on June 27, 1976 " ... or on the date set by the agency itself as the effective date of the decision if such date occurs prior to the expiration of the 30-day period..." (Emphasis ours.) In the case at bar the decision of the governing board of the district's power to reconsider its decision

expired on May 28, 1976. The district could legally eliminate its right to reconsideration by making its decision effective on the date of rendition. (De Cordoba v. Governing Board (1977) 71 Cal. App. 3d 155.) Consequently the time for filing a petition for writ of mandate in superior court expired 30 days after service of a copy of the District's decision on Mosley, (Koons v. Placer Hills Union Sch. Sist., (1976) 61 Call App. 3d 484.) The petition alleged that the date of service was June 5, 1976, but counsel's declaration alleged that June 7, 1976, was the correct date of service. Treating counsel's declaration as the equivalent of an amendment to the petition, it is manifest that the 30 day period for filing the petition for writ of mandate expired on July 7, 1976. Since the petition was

not filed until August 24, 1976, it was obviously barred by the30 day period set forth in Government Code section 11523.

Assuming without deciding that Mosley made a valid request to District to reconsider its decision on Jun 8, 1976, and that despite the ruling in De Cordoba, supra, the provision in District's decision that its decision wouod be effective on May 28, 1976, was an invalid provision, it is equally clear that District's power to reconsider expired by virtue of the provisions of Government Code Section 11521 on July 7, 1976 (30 days after the date on which Mosley admits he received notice of District's decision). Consequently the 30-day period within which Mosley could seek judicial review for writ of mandate would expire on August 7,

1976. A petition for writ of mandate f filed on August 24, 1976, would be fil d 17 days after the expiration of th max-mum possible period set forth in th statute of limitations. Consequently no matter how the problem is viewed the p tition was barred by the 30-day statute of limitations.

It is clear that the trial court was correct in its order dismissing the petition for writ of mandate. (Eichman v. Escondido etc. Sch. Dist., supra)

The purported appeal from the orde of the superior court refusing to reconsider its ruling is an appeal from a non-appealable order and should therefore be dismissed.

The order dismissing the petition for writ of mandate is affirmed. The purpirted

appeal from the order refusing to reconsider the order dismissing the petition for writ of mandate is dismissed.

SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

UNITED TEACHERS-LOS ANGELES DONALD C. BURGIO, et al., Petitioners, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	No. C 326449 MEMORANDUM OF DECISION

Petitioners herein are probationary elementary school teachers who seek review under Code of Civil Procedure Section 1094.5 of their dismissals by the Los Angeles Unifies School District. Because the right of probationary teachers to be rehired is

not vested, the standard for such review is the substantial evidence on the whole record rule. Turner v. Board of Trustees (1976) 16 Cal. 3d 818 at 824-827, disapproving contrary opinions.

Petitioners were employed by the District inder individual written contracts for the school year 1979-80. None were tenured. Each individual petitioner became a "probationary" employee within themeaning of that term as used in the Education Code. None of the petitioners had passed the regular elementary examination which is usually a precondition to such employment. One of the parties dispute the principle that requiring teachers to pass such examinations is clearly within the District's discretion in selecting elementary teachers for employment in order to ascertain if they possess the

the needed minimum skills and subject matter knowledge qualifications. Each employment contract porvided that, "A probationary contract for the following school year can be issued only if the employee has taken and passed the examination." The examination, consisting of multiple choice questions, was offered d daily. The District's policy was not to permit it to be taken more often than every six months by any individual. The same questions had been on the examination for the preceding three years. Preparation of the examination involved the participation of many teachers and subsequent expert validation thereof, obvioulsy an expensive and time-consuming task.

None of the petitioners passed the examination. By letter of March 6, 1980, from the District's Superintendent,

pursuant to Education Code Section 44949, each was informed that a reccommendation would be made that he be given notice that hisservices would not be required for the ensuing school year because of his failure to pass the examination. Each timely requested a hearing under Section 44949(b), was served with an Accusation and filed his Notice of Defense. After appropriate notice a hearing was held before an administrative law judge who prepared a propose decision containing findings of fact and dismissing the accussation. Petitioners Jackson, Kane Mosley, Presly and Watt failed to appear at the hearing and the cases against them were proven up by the district as defaults.

The administrative law judge was opinion that all petitioners were denied due process at the hearing because the District had refused to comply with his direction that it unconditionally and publicly disclose the examination and its answer key. The governing board of the district therafter rejected the proposed decision, and pursuant to section 44949(e) timely notified each petitioner that his services would not be required for the ensuing school year. The board made not express findings. Petitioners then sought this review under Code of Civil Procedure Section 1094.5.

Probationary teachers clearly have a right to a hearing before their employment can be terminated . Greer v. Board of Education of Santa Rosa (19750 47 Cal. App. 3d 98. However, that right is statutory in orgins; it is not constitutional

in nature (see the Greer case at page 113). It is also established by both statute and precedent that the decision of the board must contain express written findings; they may not be implied. Bostic v. Martin (1966) 247 Cal. App. 2d 179 at 184-186 (hrg. den.). Section 44949 provides in part that the hearing "shall be conducted and a decision made in accordance with Chapter 5 (commencing with section 11500), Part 1 of Division 3 Title 2 of the Government Code." That includes Government Code section 11518 to the effect that, "The decision shall be in writing and shall contain findings of fact ..." Lucas v. Board of Education of Fort Bragg Unified School District (1975) 13 Cal. 3d 674 at 681. Hence the decision of the board herein is ineffective. In the Lucas opinion supra, supra, under similar facts which arose under 1973 law (Education Code

Section 13443), our Supreme Court unanimously held that the probationary teacher therein was entitled to a new hearing before the board. The petitioners contend that because of the present wording of section 44949(e) and (h), they are entitled instead to reinstatement. Not only would that be an undesirable interpretation of the statute from a public policy standpoint and one which the Legislature expressly rejected in its 1969 amendments to Education Code Section 13443, but it is an interpretation which is not compelled by either section 44949(e) or (h). Th notice re quire by section 44949(e) was given; hence section 44949(h) does not apply. Unlide the predecessor statute construed in 1969 in Ward v Fremount Unified School District, 276, Cal. App. 2d 313 - and amended the same year - nothing in section 44949(e) requires that the notice given pursuant

thereto be ineffective unless at the time given the proceedings under section 44949(c) are free of correctable error. Petitioners herein are entitled only to a new determination of issues and a new decision in accordance with section 44494.

On rehearing the same fundamental questions of the law that arose at the prior hearing will arise; hence they must now be resolved. Government Code Section 11507.6 and 11507.7 as qualified by provions of Education Code section 44949(c)(2) and Government Code Section 11511 (re depositions) govern prehearing discovery. Because no such discovery was sought below, there was no violation of petitioners' prehearing discovery rights. There is no constitutional or due process right to engage in pretrial discovery. In federal

proceedings the right to engage in such discovery does not exist in the absence of statute. Miner v. Atlas (1960) 363 U.S. 641. Federal Maritime Commission v. Anglo-Canadian Shipping Company (9th Cir. 1962) 335 Fed. 2d 255. In Jones v. Superior Court (1962) 58 Cal. 2d 56 at 59, the California Supreme Court said that, "Pretrial discovery in favor of defendants, however, is not required by due process ... Accordingly, when this court permitted discovery in advance of as well as at the trial ... , it was not acting unde constitutional compulsion, but to promote the orderly ascertainment of the truth."

Discovery at the time of the hearing is governed in part by Government Code Section 11510 pertaining to subpoenas. The hearing officer has the power to

direct a party to produce relevant documents subject, of course, to an appropriate claim of privilege. Evidence Code Section 901 construed together provide that the privileges recognize.. in that code also apply in administrative proceedings, such as those involved herein, but they do not limit the privileges, to be recognized in administrative proceedings to those recognized in the Evidence Code. At the hearing herein many of the petition rs testifi d that the examination was unfair, contending that is contained ambiguous and uncertain questions and they questioned the accuracy of the grading. The administrative law judge thereupon ordered the District unconditionally to produce the examination and its answer key. The District thereupon asserted the conditional priviledge for

official information recognized in Evidence Code Section 1040. That section provides that, "(a) ... official information") when information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed, to the public ... (b) a public entity has a privilege to refuse to disclose official information, ... ifthe privile is claimed by a person authorized by the public entity to do so and ... (2) disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; ..." The District properly asserted its claim of privilege. The examination was obtained by those employees who had access to it in confidence in the course of their duties and

there is an obvious need to protect such examinations from unnecessary public disclosure. This has been recognized by the California Legislature in th Public RecordsAct at Government Code Section 6254(g) and by the U.S. Supreme Court in Detroit Edison Company v. National Labor Relations Board (1979) 440 U.S. 301 However, in considering a claim that official information is privileged, a court is required to balance the public interest in the confidentiality of the information against the private interest in its disclosure City of Los Angeles v. Superior Court (1973) 33 Cal. App. 3d 778 at 785. This preliminary determination of fact must be made by administrative law judge upon the basis of the evidence regarding the District's need to maintain the confidentiality of this examination and

and each petitioner's need for access to the examination and its answer key to demonstrate the unfairness, if any, that resulted from incorrect marking, from ambiguous or misleading questions or other factors. Not all petitioners desired access to the examination at the original hearing (TR vol. I page 100 line 15; page 101 line 16; page 146 lines 14-18) and at least one said that it was fair.

The peitiooners' need for such disclosure to demonstrate such infairness is likewise incontestable. Neverthe less, the administrative law judge can readily draft protective order accomodating both interests. He may well require discloure at a hearing closed to the public, seal appropriate portions of the record and order the parties. their counsel and any witnesses. expert or otherwise, to make

no future disclosure of the examination questions and answers except in connection with these examination questions and answers except in connection with these proceedings. Other alternatives also suggest themselves. Although he has no contempt power, such orders would be enforceable by the contemp power of this court in proceedings brought pursuant to Government Code Section 11523. If the District refused to obey such an order, it would act at the peril of losing its case.

The District's offer to disclose the examination and its answer key to peitioner conditioned upon each individual petitioner's waiver of his right to retake the examination within the six months following the hearing imposes an invalid condition upon a petitioner's right to seek a hearing under Education Code Section 44949(b). Nothing prevents the District

Nothing prevents the District from developing alternative examinations to use in Department of Motor Vehicle in giving automobile drivers license examination.

The complete and unconditional disclosure of the examination ordered by the administrative law judge was a substantially greater and more damaging disclosure than was required by the circumstances here and constituted an abuse of his diecretion.

Petitioners Jackson, Kane, Mosley, Presley and Watt failed to appear at the hearing. They had been given the require notice. It is contended that in the default proceedings that took place the district failed to prove up a prima facie case against these petitioners because the examination and its answer key were not made part of the administrative record.

Government Code Section11520 requires the district to introduce evidence sufficient to support its decision even when petitioners fail to appear. Peitioners concede (Supplemental Points and Authorities filed 7 October 1980, page 3 lines 14-19) that under these circumstances the "rebutting proof (offered by other petitioners) as it relates to those individual peitiioners (who did not appear) cannot be considered." The evidence with respect to these particular petitioners therefore remains unrebutted. It is to the effect that the examination was prepared by an ethnically balanced group of qualified and experience teachers, had been given over a period of three years with only a trival change, had been validated by district's staff expert and had been passed by overwhelming majority of otherwise qualified applicants who took

it. The proposition that the examination w was fair in every respect enjoys the benefit of the rebuttable presujption that official duty has been properly performed. This presumption applies in administrative psroceedings. Griffith v. County of Los Angeles Cal. App. 2d 837 at 842 (hrg. den) cert. den. 395 U.S. 954. This presumption has not been rebutted as to these parti cular petitioners. In this state of the record - even without a copy of the examination and its answer key - the district has clearly sistained its burden of proof with respect to petitioners Jackson, Kane, M^{O}sley, Presly and Watt; substantial evidence supports their dismissal.

The original petition herein was filed on 16 June 1980. Neither Ozella Presly nor Mary G. Wilkins were named as petitioners therein. On 4 August 1980 ah amended

petition was filed by the original petitioners plus Presly and Wilkins. Government Code Dection 11523 requires such petition f for judicial review to be filed within 30 days after the last day in which reconsideration by the district could be ordered. In this case, Education Code Section 44949(e) and (h) fixed 15 May 1980 at the date on which the district's action after the hearing became final. Hence the peitiions of Presly and Wilkins are not timely and are dismissed.

Peitiioners have requested an award of attorney fees under Government Code Section 800 which permits such an award if the court finds that the determinations of the board were the result of arbitrary or capricious action. The issues herein involving the conditional privilege asserted under Evidence Code Section 1040 protect-

ing the district's examination for entry level elementary school teachers from public disclosure are issues of first impression in this state and elsewhere. In the absence of judicial guidance, the conduct of the district was neither arbitrary nor capricious. The petitione for attorney's fees's is therefore denied.

The petitions of petitioners Jackson, Kane, Mosley, Presly, Watt and Wilkins are denied for the reasons stated above.

The decision of the district with respect to the other petitioners herein is vacated as is the proposed decision of the administrative law judge. The district is ordered to grant a rehearing to those petitioners in accordance with the views stated above.

A.R. Early
Judge of the Superior Court

Dated: November 20, 1980

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 85 HON JOHN L. COLE, JUDGE

EDGAR MOSLEY,
Petitioner,

vs.

THURMAND JOHNSON, et al.,

RESPONDENTS.

NO. C 379 885

REPORTER'S TRANSCRIPT OF PROCEEDINGS
December 10, 1981; February 2, 1982

***

APPERANCES:

For the Petitioner: EDGAR MOSLEY, Pro Per
1190 Marada Place
Altadena, Ca. 91109
684-3529

For the Respondents: LINDA F. THAIS
MELANIE E. LOMAX
604 South Tamarind Av
Compton, Ca. 90220
537-2700, Ext. 501

YOSHIYE YAMADA
CSR No. 759
Official Ct Reporter

LOS ANGELES, CALIFORNIA, THURSDAY, DECEMBER, 10, 1981, 10:28a.m.

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THE COURT: I have a second call matter, Mosley v. Johnson. That is yours. Is counsel here now ?

MS. LOMAX: Yes. My name is Malanie Lomas, and I am the attorney for the Compton Unified School District.

THE COURT: Allright. Thank you.

An inspection of the file shows that a second amended peition was filed on December 3. The clerk accepted it for filing by mistake.

Mr. Mosley, you cannot just go ahead and file amended pleadings willy nilly when you want. You have to get court permission. You can amend your petition once as of right before there is any ruling of law, but after that, you may never again file an

amended petition unless you come in and move the court for leave to do.

I realize that you tried to update things that happened last November 24, just before Thanksgiving. I don't know why you did it. I am not criticizing you, but if in fact you needed to do it, I would grant leave for you to do it. And I do now so grant that leave to remain fil d.

The effect on the hearing this morning, however, if that I can't proceed with it. And the reason I can't proceed with it is that the respondents have not had the minmum time allowed by law to reply and to answer.

So because of these facts, I am going to have to give respondents time to plead to the second amended petition and continue this matter to some other date on which

it can be heard.

How much time do you need to reply, ,s Lomax?

MS. LOMAX: Well because of the issues involved, Your Honor, we would appreciata at least a two-week continuance.

THE COURT: How Long?

MS. LOMAX: Two weeks at least, Your Honor.

THE COURT: Weel, I am going to continue it much longer than that.

MS. LOMAX: Okay

THE COURT: I just want to know how much time you need to reply. After you reply, than Mr. Lomax gets his shot at those papers and so forth.

MR. MOSLEY: I am Mr Mosley.

THE COURT: I mean, Mr. Mosley gets a shot at those papers.

MR. MOSLEY: I would have a chance to reply to--

THE COURT: That is what I just said.

MR. MOSLEY: Okay.

MS. LOMAX: Anytime in January, Your Honor. The second or fourth week.

THE COURT: All right.

MS LOMAX: The week of the 25th.

THE COURT: Is it enough for the respondent to have two weeks to reply or to do you want more than that?

MS LOMAX: Well, because of Christmas and the holidays, how about giving us at least --

THE COURT: 30 days to reply?

Ms. Lomax: Right.

THE COURT: All right. Respondents may have to and including January 11 within which to reply. Then, Mr. Mosley, you may put in any documents in connection with that reply by -- how much time do

you need sir?

MR. MOSLEY: Two weeks after that.

THE COURT: --January 25. The matter will go on the court's calendarn on -- do we have a January date?

THE CLERK: February.

THE COURT: How about February 2?

THE CLERK: That is a Monday.

THE COURT: February 2?

MR. MOSLEY: That will be fine.

MR. MOSLEY: That will be fine.

MS. LOMAX: Good, Your Honor.

MR. MOSLEY: I have one more question.

THE COURT: Yes Sir.

MS. LOMAX: Your Honor, I have one question as well. I have attempted to explain to Mr. Mosley that the exhibits which he referred to in the petition must be attached and served on the respondents as well.

THE COURT: Yes they must be. Were they not?

MS. LOMAX: No, they were not, Your Honor.

THE COURT: Are they not?

MS. LOMAX: They were not. No exhibits were attached.

THE COURT: They should be attached.

MR. MOSLEY: I attached the exhibits, Your Honor. And those exhibits, in any case, are within the district already, but I attached the exhibits.

TEH COURT: Where? This is your second amended petition. Where are the exhibits?

MR. MOSLEY: Yes, they were attached to it. The clerk attached them.

THE COURT: There are no exhibits here, Mr. Mosley, attached. There are loose papers in the file, sir, which you should look at after the hearing, labeled Exhibits A,B, and C. In fact, I think I remember

looking at these now and deciding that I was utterly confuse. These are just loose documents, as far as I an concern.

MR. MOSLEY: I had them attached, Your Honor when I submitted them.

THE COURT: Are they clipped in ? How many are there? A through what?

MR MOSLEY: A through O.

THE COURT: All right. I will order, just in the interest of simplicity -- you have to make sure that counsel has the exhibits. The fact that they are in the District is not relevant. Them must be attached to the petition you served on her. And if they have not been attached, then you must now serve her another document and do it today or tomorrow, as soon as you reasonably can, that these are the exhibitd intended to be attached to the second amended petition. Can you do that?

MR. MOSLEY: Yes sir, I can do that.

THE COURT: Mr. Clerk, attach these exhibits A through, all right. That will be all for today.

MR MOSLEY: Your Honor, can I ask a question?

MR MOSLEY: Yes, Would it be all right for me to go back to work without pr judicing my case?

THE COURT: What?

MR. MOSLEY: Would it be all right for me to go back and work in the Compton Unified School District without prejudicing my case?

THE COURT: I have no idea. I haven't gotten into the merits al all.

MR. MOSLEY: OKAY

MS. LOMAX: Thank you, Your Honor.

(The proceedings in this matter were concluded)

LOS ANGELES, CALIFORNIA, TUESDAY, FEBRUARY 2, 1982, 10:05a.m.

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THE COURT: No 11, Mosley.

MS. THAIS: Linda Thais, T-H-A-I-S, for Compton Unified School District.

MR. MOSLEY: Edgar Mosley, pro per.

THE COURT: The administrative record is received into evidence.

The petition os somewhat confuse. I realize you are not a lawyer, Mr Mosley. You are representing yourself.

I assume that the standard of review is one of independent review of the evidence. Whether it is or isn't, I an going to adopt that standard, that it is the standard of independent review.

Now, as I understand your case, Mr. Mosley, you claim that you have a right to permanent status, at least as a probation-

ary permanent status, as opposed to a tempoaray, day-to-day or some other kind of subdtitute status, because you filled a vacancy, replacing a teacher who was promoted. Your Exhibit C shows that is what happened to that teacher.

The School District seems to argue that you are a day-to-day substitute first and then you were a long-term substitute and regards you as temporary employee.

The School District answers your Exhibit C, which is the exhibit which shows t.. .. the teacher you replaced was promoted, or whatever happened to her when she went to another position by saying that you don't look only at that particular teacher's spot -- I forgot her name now -- the spot of the particular lady whose place you were taking, but o look from a districtwide point of view at the fact that at the time you came

in as a substitute teacher, there were 40 teachers who were on leave of absence or temporarily disabled, and therefore they could assign you to that position that you were assigned to until one of those 40 teachers returned to fill it.

Now, there is a case -- I don't remember whether it was cited by the parties or whether we found it in our research in preparing this matter, but there is a case , Mr. Mosley, which seems to bear out the SchoolDistrict's position, the approach taken by the court in a case called Campbell Elementary Teachers Association vs. Abbott a 1978 case, 76 Cal. App. 3d 796, at pages 815 and 816. The language of that case supports the School District's argument.

If that is right, then you don't have a legal case. You were paid according to

to your status as a long-term substitute. You did not sign the contract as a temporary contract substitute, which would have kept you employed for the semester, and therefore there ouldn't be any legal ground for granting your petition.

That is my tentative feeling.

MR. MOSLEY: Weel, Your Honor, I came back, as I stated under Education Code 44916, and the document that they presented to me was not a document under Education Code 44916.

THE COURT: You say that the document does not clearly indicate the temporary nature of the employment and the length of time for which you are being employed.

It does say, however, sir, "substitute," which indicates the temporary nature of the employment, and it does show that you were being paid, under that orginal document,

$55 per day. And that showing is enough to me to show a substantial compliance with section 44916 of the Education Code.

MR. MOSLEY: Well, 44916 additionally says that it states how long will I be employed.

Your Honor, I didn't know what Education Code governed my employment. As I tried to point out in my petition that each situation is depending upon what Education Code controls it.

Now, if I was hired under 44920, that would say that I would be on a one-semester basis only. Or if I was hired on a day-to day---

THE COURT: Well, I think, sir, you tend to mis up your argument. You dod in your petition and you are doing it here, too.

Your underlying problem is: You think

you are entitled to permanent status. There has never been any question in this case of your competence, or your ability. You are a competent, able teacher, and the School District admits it. The only question is that of your status. Were you temporary or permanent, "permanent" to include the word "probationary"?

And your whole argument goes back to the point we have already discussed, and there is no sense repeating it, that the lady you replaced was permanently gone from her position and therefore you say you couldn't be a substitute.

The School District says you could be, because you look at it on a district-wide basis. And I think they are right under the Campbell case which I cited.

The petition is denied.

MS. THAIS: Thank you, Your Honor.

THE COURT: Prepare a judgment, counsel,' articulating the -- the views I have said, by the way, as the -- I recognize that Mr. Mosley is representing himself. I will take the statement I just made as my statement of decision on the principal controverted issues on the case. And you prepare a judgment accordingly.

MS THAIS: Yes, Your Honor.

(The proceedings in this case were concluded)

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDGAR MOSLEY, Plaintiff, v. R. NOEL, KATHRYN NACK, HENRY MYERS, et al., Defendants.	) CASE NO CV 83-5039)) FINAL REPORT AND REC-) OMMENDATION OF UNITED) STATES MAGISTRATE

This Final Report and Recommendation and the attached Report and Recommendation are submitted to the Honorable Edward Rafeedie, United States District Judge., pursuant to the provisions of 28 U.S.C. Section 636(b)(1)(B) and General Order 194 of the United States District Court of California.

To the Report and Recommendation, filed and mailed on March 26, 1984, palintiff has made timely objections. The Magistrate

is not persuaded by the Objections to change his original recommendation.

Plaintiff object to the authority of the Magistrate to submit the Report and Recommendation arguing that he is thereby "determining" motions for summary judgment in violation of the prohibitions or 28 U.S.C. section 636 (b)(1)(A). This objection is based on a misreading of the statute. The Magistrate is not here "determining" under subsection (b)(1)(A), but, instead, is expressly "recomm nding" under subsection (b)(1)(B), as permitted.

Plaintiff obj cts that the Magistrate prematurely dismissed the Compton defendants. Objections, p. 9 Although, arguably, this objection is raised too late (See Federal Rule of Civil Procedure 72(a), Local Rule 7.12.), the question is addressed on its substance, and the Court shouldnow dismiss

these defendants, with prejudice, for the following reasons:

The aforesaid "Compton" defendants moved to dismiss or, in the alternative, for a more definite statement, on the ground among others, of failure to state a claim upon which relief as to them can be granted. The motion presents "matteroutside the pleading," most notably material from the files of the Superior Court for Los Angeles County, as a consequence of which the Magistrate treats it was one for summary judgment to be disposed of as provided by Rule 56, F.R.Civ.P. Rule 12(b), F.R.Civ. P.

Summarized, the complaints and exhibits on file show that plaintiff was employed by the Compton Unified School District for the school years 1980-81 and 1981-82 as a certificated teacher. Amended Complaint,

page 32. He was told that the position for which he applied was"temporary" because it existed because another teacher was "on leave working in categorically funded program." Complaint, page 25. He was terminated when he refused to sign the Temporary Contract Form. Amended Complaint, page 87. He maintains, however, that he was hired "without a contractual agreement on February 2, 1981," and therefore is entitled, under Education Code Section 44916 t classification as a "probationary employee" because no writing indicated the temporary nature of the employment. Plaintiff himself has alleged, however, that he was hired on said date pursuant to Personnel Status Notice, Exhibit "A" to his Opposition in Superior Court, Exhibit "B" to defendants' said Motion. This writing sufficiently states the temporary nature of the employ-

ment as "Long Term Substitute Teacher." It is alleged that the California Court of Appeal, in American Federation of Teacher v. Board of Education, 77 C.A. 3d 100, was "without authority" to hold that, as here, school districts "may employ teachers as temporary employees to take the place of tenure or probationary ... employees who have taken leave from their regular assignments in order to work ina categorically funded project." Complaint, pp. 28-29. The actions of the Compton defendants, it is alleged, denied plaintiff "equal protection" and otherwise violted the laws and Constitution of the State of California and the United States.

Substantially identical allegations were made and issues were framed in Los Angeles Superior Court action No. C479885, Mosley v. Thurmond Johnson, et al., per this

plaintiff's Second Amended Petition for Writ of Mandate, Exhibit "A" to the subject Motion. A certified copy of Minute Order in said Superior Court action is before this Court as Exhibit "1" to the Compton defendants' Memorandum of Points and Authorities dated October 13, 1983, significantly providing: "The administrative record is received in evidence by reference. The peitione is argued and denied."

The subject motion was fully argued before the Magistrate on November 22, 1983. The parties agreed in open court that the aforsaid ruling of the Superior Court apparently never was formalized by the filing of a formal Judgment. The record does show that plaintiff, however, first filed an appeal therefrom to the California Court of Appeal which he then voluntarily dismissed.

This action as to the Compton defendants

is barred by the res judicata effect of the California state court decision, which is either a final judgment or can be made one by a merely miisterial act. See Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 696-7 (1904). State judgment are entitled to full res judicata effect in federal civil rights litigations. Allen .w. McCurry 449 U.S. 90 (1980). Otherwise stated: "When a party seeks reli f in state court for an alleged wrong, he is thereafter barred from seeking relief on consittutional grounds from the same defendant, for the same wrong in federal court." Rutdedge v Arizona Board of Regents, 660 F.2d 1345, 1351 (9th Cir. 1981), affirmed, __U.S. ___103 S.Ct 1493.

The Magistrate notes parenthetically that, although plaintiff includes a 42 US.C

Section 2000e allegation in his complaint (Complaint, page 30), it is meaningless for his failure to allege exhaustion of his administrative remedy, a remedy which is open court he has admitted he did not and now cannot exhaust.) See 42 U.S.C. Section 2000e-5and (e); Love v. Pullman 404 U.S. 522 524-25 (1972)

Plaintiff attempted to file an Amended Complaint alleging fraud and various tort violations on the part of defendants. The Amended Complaint was lodged on October 25, 1983, after a number of pleadings responsive to the original complaint had been served Permission to file was denied pursuant to Federal Rule of Civil Procedure 15(a). As the Magistrate has previously stated: "Pla ntiff's effective pleading, therefore remains his original complaint, but the Magistrate may and does take representation

in the Amended Complaint into account." Again, as has been his practice, plaintiff failed properly and timely to raise objections to the denial pursuant to Federal Rule of Civil Procedure 72(a) and/or Local Rule 7.13.

Plaintiff further attempts to reintroduce the fraud allegation by contending California Code of Civil Procedure Section 338(4) [1] is the applicable statute of limitations period as the action os one for relief on the grounds of fraud or mistake. For purposes of the statute of limitations under section 339(4), an action for relief on the grounds of fraud is not deemed to accrue until "discovery" of the fraud.

Even if the court construed valid assertion of section 338(4), the operative facts essential to the claims were known or suspected by plaintiff early enough to

to bar the claims. "Under California law, discovery of alleged fraud, within meaning of statute of limitations for actions based on fraud, occurs when plaintiff has means of knowledge or notice which followed by inquiry would have shown circumstances upon which cause of action is founded." Harley-Davidson Motor Co.v. Custom Cycle Delight, 664 F.2d 1271, 1372, (9th Cir. 1982); re-hearing denied en banc (9th Cir. 1982). The statute of limitations uncer section 338(4) does not begin to run until alleged deception is disception is discovered or" in the exercise of reasonable deligence" could have been discovered. Rochelle v. Marine Midland Grace Trust Co. of N.Y. 535 F.2d 523, 531 (9th Cir. 1976).

Mr. Mosley was aware the Pasadena Unified School District was terminating his employment when he received written notifi-

cation on March 12, 1976, He pusued the matter, from 1976-1978, in administrative hearings, in state codurt, and in federal court. [2] Mr. Mosley was aware the Los Angeles Unified School District was terminating his employment when he received written notification on March 6, 1980. He pursued the matter, in 1980, in administrative hearings and in state court. [3] Mr. Mosley was aware he would not be permitted "continued enrollment" in the Education Administrative Masters Program at California state University at Los Angeles, whe he received written notification in December, 1976. He pursued the matter via written correspondence with the department chairman, rather than through administrative channels, until his "readmittance" in September, 1979. Mr. Mosley was aware the California Employment Development Department was goint to

prosecute him for criminal violations of the California Unemployment Insurance Code when he received written notification on November 16, 1979. From 1979-1982, Mr. Mosley received continual notices as to his ineligibility status, his overpaym nts, and his appeal procedures.

Plaintiff has been well aware of circumstances surronuding hos terminations, his de-enrollment, and his benefit ineligibility status, as these matters have been pursue with the aid of counsel in various administrative, state, and federal courts since 1976. "California law has long been settled that plaintiff suing for fraud or mistake more than three years after relevant events must plead and prove (1) their lack of knowledge of the operative facts, (2), the absence of the means of obtaining that knowledge (i.e.

exercising reasonable diligence, plaintiffs could not have discovered the facts within three years). and (3) the time and manner of their actual discovery of facts." Salveson v. Western States Bankcard Association et al., 525 F. Supp. 566, 584 (N.D. Ca., 1981). Plaintiff has failed to provide any information under this three prong California test, and should realize that his inability to accept numerous decisions of various California and federal courts neither constitutes nor rises to the level of actionable fraud.

Plaintiff additionally argues that since he has failed to meet the prerequisites mandatory in filing a suit pursuant to Title VII of the 1964 Civil Right Act, 42 U.S.C. Section 2000e-2, he is not, therefore, bound by their administrative procedures. This is incorrect

Mr. Mosley alleges in his Complaint a violation of 42 U.S.C. Section 2000e-2, and in doing so, he has designated the federal statute utilized to maintain his claim of race discrimination. Failure to follow the Act's outlined statutory procedures does not exclude an individual from the law's binding effect. If plaintiff alleges a violation of a federal statute, he os obligated to follow statutorily mandated procedures in order to obtain porper relief. Failing to do so, he is unable to maintain his cause of action.

Plaintiff continues to relitigate matters that have been previously decided by state and federal judicial procedures, and by Settlement Agreement. His claims are barred by the doctrine of res judicata, and he has failed to provide any new and relevant

information. Settled claims are moot. Williams v. Owens -Illinois, Inc.,665 F.2d 918, 932 (9th Cir. 1982), cert. denied, 103 S.Ct. 302 (1982).

IT IS THEREFORE THE FINAL RECOMMENDATION OF THE MAGISTRATE that an Order be issued by the Court (1) approving and adopting the Report and Recommendation, and (2) directing that Judgment be entered dismissing the action with prejudice.

Dated: May 22, 1984

VOLNEY V. BROWN JR.
United States Magistrate

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDGAR MOSLEY, Plaintiff, vs R NOEL, KAYTHRYN NACK, HENRY MYERS, et al., Defendants.	CASE NO. CV 83-5039 (B) JUDGMENT

Pursuant to th Order of the Court adopting the findings, conclusions, and recommendations of the United States Magistrate,

IT IS ADJUDGED that this action be dismissed with prejudice.

DATED: May 25, 1984.

EDWARD RAFEEDIE
United States District
Judge

File_____
Sept 8, 1986

IN THE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that, Edgar Mosley, the appellant in this case, hereby appeals to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the Ninth Circuit dated June 26, 1986, rehearing denied by order dated July 31, 1986, affirming the judgment of United States District Court for the District of California. Dated September 5, 1986.

This appeal is taken pursuant to 28 U.S.C. 1254 (2&3)

Edgar Mosley